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No. 85-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. WHETHER SECTION 12-22-72 OF THE *CODE OF ALABAMA* (1975), WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT, WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS, IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE AND NOT APPLICABLE TO ACTIONS IN FEDERAL COURT.

PARTIES TO THE PROCEEDING

A list of parties and affiliated or related parties is printed at page ii, Petition for Writ of Certiorari.

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BRIEF OF PETITIONER

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals, related to the substantive issues in the case, appears at 768 F.2d 1287 (11th Cir. 1985) and is printed at Appendix D of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying Petitioner's motions for a stay of proceedings or in the alternative for oral argument is printed at Appendix M of the Joint Appendix. (J.A. 39) The Order of the Eleventh Circuit granting Respondents' motion for ten percent penalty assessment pursuant to Alabama statute is printed at Appendix A of

the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying rehearing is printed at Appendix N of the Joint Appendix. (J.A. 40)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(1966), to review questions involving the constitutionality of an Alabama statute and the application of that statute in federal court. The order of the United States Court of Appeals for the Eleventh Circuit granting the ten percent statutory affirmance penalty was entered on September 19, 1985, and the Petition for Certiorari was filed December 17, 1985, within the ninety-day period allowed by 28 U.S.C. § 2101(c)(1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The applicable constitutional provisions, statutes and rules are printed as the Appendix to this brief.

STATEMENT OF THE CASE

Alan Woods and Cara Woods brought suit on October 15, 1982 in the Tenth Judicial Circuit of Alabama, Bessemer Division, against the Burlington Northern Railroad Company (hereinafter "Burlington Northern") and others to recover damages for injuries sustained in a motorcycle accident. (J.A.4) The case was removed to the United States District Court for the Northern District of Alabama on November 15, 1982. On December 28, 1982, the Woods deleted the other defendants, and Burlington Northern was the sole remaining defendant.

The case was tried in January 1984, and the jury returned a verdict of $300,000.00 in favor of Alan Woods and $5,000.00 in favor of Cara Woods. Judgment was entered based on the jury verdict on January 13, 1984. (J.A.9) Burlington Northern filed

a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, on January 23, 1984. (J.A.14) This motion was overruled on June 29, 1985.

On July 24, 1985, Burlington Northern filed a Notice of Appeal in the district court along with a Motion for a Stay of Execution Pending Appeal and a Bond for Costs on Appeal and Supersedeas Bond. (J.A.21-24) Under the terms of the Bond, the Woods were guaranteed by the bonding company that the judgment, interest and costs of judgment and appeal would be paid. On August 16, 1985, the Eleventh Circuit Court of Appeals affirmed the judgment of the trial court. (A.6 of Petition for Writ of Certiorari and J.A.25)

On August 26, 1985, the Woods filed a motion for assessment of statutory penalty, seeking to recover a penalty of ten percent of the judgment pursuant to Section 12-22-72 Code of Alabama (1975) [hereinafter "Alabama Affirmance Penalty"]. (A.2 of Petition for Writ of Certiorari) Burlington Northern responded to this motion on August 30, 1985. (A.4 of Petition for Writ of Certiorari) The response contended that the Alabama Affirmance Penalty was unconstitutional under both the Equal Protection Clause and the Due Process Clause and that it is a procedural rule and is inapplicable in federal court.[1]

Burlington Northern filed a Motion for Stay of Proceedings or in the Alternative for Oral Argument on the issue of the Alabama Affirmance Penalty on August 30, 1985. (J.A.27) Burlington Northern also filed a Motion for Panel Rehearing on September 5, 1985. (J.A.29)

The Woods' motion for statutory penalty was granted on September 19, 1985. (A.1 of Petition for Writ of Certiorari). On

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[1] Additionally, the response noted that the judgment was not final at the time of the Woods' motion. The Eleventh Circuit subsequently denied Burlington Northern's Petition for Panel Rehearing thus mooting the issue of timeliness.

the same date, the court denied Burlington Northern's motions for stay of proceedings and for oral argument. (J.A. 39) The Petition for Rehearing was denied September 23, 1985. (J.A.40)

In November 1985, both parties filed stipulations in the District Court (November 12) and the Court of Appeals (November 14), stating that the entire judgment, with the exception of the Alabama Affirmance Penalty, had been paid. Payment of the penalty was being withheld pending resolution of the issue before this Court. (J.A.41 and 42)

Burlington Northern petitioned this Court for a Writ of Certiorari on December 17, 1985, and Certiorari was granted March 24, 1986.

Because the constitutionality of a state statute is drawn into question by the present action, 28 U.S.C. § 2403(b)(1978) may be applicable. No federal court has certified to the Attorney General of the State of Alabama the fact that the constitutionality of an Alabama statute has been drawn into question. A copy of this brief has been served on the Attorney General of the State of Alabama.

SUMMARY OF THE ARGUMENT

I.

In order to analyze whether a state statute violates the Equal Protection Clause of the Fourteenth Amendment, it is necessary to determine the character of the right disadvantaged by the statute, the state interest promoted by the statute, and the relationship between the classifications made by the statute and its stated goals.

Equal access to an established appellate system is a fundamental right under the Constitution. *Rinaldi v. Yeager,* 384 U.S. 305 (1966). Because of the importance of this right, the Alabama Affirmance Penalty, which restricts this right by treating different groups of appellants disparately, would need to be precisely tailored to the promotion of a compelling state interest in order to be constitutional. *Plyler v. Doe,* 457 U.S. 202 (1982); *Shapiro v. Thompson,* 394 U.S. 618 (1969). Analysis shows, however, that neither of the state interests claimed to be promoted by the Alabama statute is sufficiently compelling or substantial to justify interference with a basic right. *Lindsey v. Normet,* 405 U.S. 56 (1972). Moreover, the statute creates classifications that are both overinclusive and underinclusive in their effect, so that they bear no rational relationship to any policy goals of the statute. *Jimenez v. Weinberger,* 417 U.S. 628 (1974).

The Alabama statute also violates the Due Process Clause of the Fourteenth Amendment by erecting a barrier that amounts to an impermissible penalty against those who choose to exercise their statutory right to appeal adverse judgments. *North Carolina v. Pearce,* 395 U.S. 711 (1969). Due Process must be observed in the appellate system. *Griffin v. Illinois,* 351 U.S. 12 (1956); *Evitts v. Lucey,* 53 U.S.L.W. 4101 (U.S. Jan. 21, 1985), *reh. den.* ____ U.S. ____, 105 S. Ct. 1784. Because the Alabama statute penalizes all appellants in a certain class, without regard to any concern for culpability, an irrebuttable

presumption of improper appellant behavior is created, thus denying the affected class members any opportunity to be heard, and resulting in a taking of property without Due Process of law. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974).

II.

The Eleventh Circuit stands alone in applying affirmance penalty statutes in federal court. *Affholder, Inc. v. Southern Rock, Inc.,* 746 F.2d 305 (5th Cir. 1984); *Nordmeyer v. Sanzone,* 315 F.2d 780 (6th Cir. 1963).

If the Federal Rules of Procedure conflict with state provisions, the Federal Rules will be followed in federal court as long as they are validly within the scope of the Rules Enabling Act. *Hanna v. Plumer,* 380 U.S. 460 (1965). Alabama's Affirmance Penalty covers ground that is already fully covered by the Federal Rules of Appellate Procedure. The applicable Rules regulate procedure, and thus fall within the Enabling Act's purview. *Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941). Therefore, the federal court should not have followed the Alabama Affirmance Penalty.

Even if the Alabama Affirmance Penalty did not directly conflict with the Federal Rules of Appellate Procedure, under the principles of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and *Hanna v. Plumer,* 380 U.S. 460 (1965), the federal courts should not apply the state statute. Use of the statute does not affect the outcome of the litigation. *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945). The Alabama statute is not bound up with any substantive rights or duties granted by the laws of the state. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The federal policy favors uniformity of procedure under the Federal Rules and there is no countervailing state policy which is bound up with enforcing the Alabama Affirmance Penalty in federal court. *Byrd v. Blue Ridge Rural Elec-*

tric Cooperative, 356 U.S. 525 (1958). Failure to use the state statute in federal court has no effect on forum shopping and would not produce any resultant inequitable treatment of citizens and noncitizens. *Hanna v. Plumer,* 380 U.S. 460 (1965). The promulgation of rules of appellate procedure by a federal court is not an unconstitutional exercise of power over substantive state law of the type prohibited by *Erie. Hanna v. Plumer,* 380 U.S. 460 (1965).

ARGUMENT

I. Introduction: The Purpose And Effect Of The Alabama Affirmance Penalty

The questions raised in this case involve Section 12-22-72 Code of Alabama (1975), which provides:

> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

The statute originated from An Act of the Mississippi Territory Concerning Writs of Error, passed December 18, 1811. Toulmin's Digest, tit. 39, ch. III, § 1 (1823). (A. 4-5) The first statute provided for damages of ten percent on all affirmed judgments, without regard to whether there had been a stay. A later act, passed in 1820, added the proviso that the penalty was

to be applied in the Supreme Court only if the judgment below had been suspended. Toulmin's Digest, tit. 36, ch. XXVI, §11 (1823). (A.- 5)

Until 1975, the Alabama Affirmance Penalty was the sole monetary sanction dealing with frivolous appeals.[2] When the Alabama Rules of Appellate Procedure were adopted, however, Rule 38 for the first time provided for the specific assessment of damages against an appellant whom the appellate court deemed to have brought an appeal that was frivolous. (A.- 8) The Alabama Affirmance Penalty remained intact, and thus the duplicative procedures have continued to exist side by side since that time.

A 1951 amendment somewhat clouds the picture. It adds the language:

> provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

The statute as amended might be interpreted as applying not only where defendants have posted a supersedeas bond, but also in those cases in which no stay has been obtained. Note, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations,* 32 Ala. L. Rev. 197 (1980). Nevertheless, the statute has

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[2] Rule XI of the 1830 Alabama Rules of Practice in the Supreme Court sought to avoid expending the court's time on appeals brought only for purposes of delay, by providing that the judgment underlying such appeals could be summarily affirmed. (A.- 7) Rule XI was the direct predecessor of Rule 17 of the Alabama Revised Rules of Practice in the Supreme Court (A. 7-8), which was replaced and expanded upon by Rule 38 of the Alabama Rules of Appellate Procedure when the new rules were adopted in 1975.

not yet been invoked, to our knowledge, except in cases where there has been a suspended judgment. The amendment was added shortly after the decision in *City of Birmingham v. Bowen,* 254 Ala. 41, 47 So. 2d 174 (1950) (on motion to modify final judgment of affirmance)(per curiam), which held that the Alabama Affirmance Penalty applied to municipalities, even though they could obtain a stay without posting bond. We surmise from subsequent applications of the Alabama Affirmance Penalty that the amendment was designed to conform to the *Bowen* opinion, so that the penalty can apply when there is a stay of a money judgment whether or not supersedeas is obtained.

The Alabama cases have discussed two possible purposes for the Alabama Affirmance Penalty. In a 1920 case, the Alabama Supreme Court stated that "This statute . . . was evidently intended to penalize frivolous or delay appeals." *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920)(addenda). This analysis was reiterated in *Chapman v. Rivers Construction Co.,* 284 Ala. 633, 645, 227 So. 2d 403, 415 (1969)(on rehearing). The courts have assessed the penalty, however, without regard to whether the appeal is frivolous. *Lloyd v. Stewart,* 258 Ala. 627, 60 So. 2d 911 (1952), 64 So. 2d 884 (1953)(on rehearing).

In a 1934 case, the Alabama Supreme Court stated that the effect on frivolous appeals was not the statute's only purpose, although no alternative rationale was suggested. *Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934). Another purpose was finally articulated in *City of Birmingham v. Bowen,* 254 Ala. at 47, 47 So. 2d at 180, which announced that the "real purpose" of the statute was to provide additional damages for affected plaintiff-appellees.

There are other provisions under Alabama law that already afford protection of the litigated property of the plaintiff who successfully defends against an appeal. In the first place, the

defendant must provide a supersedeas bond in order to obtain a stay. The surety must be approved by the clerk of the circuit court, and the amount must equal one hundred fifty percent of the judgment if it does not exceed $10,000, or one hundred twenty-five percent of the judgment if it is greater than $10,000. The bond assures payment of the judgment, interest and costs of both the trial and appellate court. Rule 8, Ala. R. App. P. (A. 8-9) Thus, before the judgment may be stayed, the plaintiff receives protection against financial insolvency of the defendant as well as against the possibility that the defendant might abscond or avoid payment. Second, the costs of delay in payment of the judgment are compensated by the assessment of twelve percent simple per annum interest on the judgment running from the date of judgment to the date of payment. Rule 37, Ala. R. App. P.; Ala. Code § 8-8-10 (1975). (A.- 9) (A. 6-7) Finally, there is also the provision under Rule 38 of the Alabama Rules of Appellate Procedure, already discussed, which authorizes assessment of damages on frivolous appeals.

The class of persons who must pay the Alabama Affirmance Penalty include those against whom a money judgment is affirmed, where the judgment has been stayed, either by operation of a supersedeas bond (*Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858), or by virtue of the special status accorded to governmental entities (*City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174). There are two companion statutes which require that a penalty be paid on affirmance of a judgment for recovery of real or personal property in the amount of ten percent of the alternative value of such property. Ala. Code §§ 12-22-73, 12-22-74 (1975). Otherwise, the penalty does not apply to plaintiff-appellants or to defendants who appeal from non-monetary awards. Neither does it apply against defendants who unsuccessfully appeal from money judgments when no stay is obtained, even if the judgment remains unsatisfied pending appeal.

The penalty is imposed only when there is a complete affirmance of the judgment below, and any modification of the judgment makes it inapplicable. *Chapman v. Rivers Construction Co.,* 284 Ala. at 644-45, 227 So. 2d at 414-15.

Basically three aspects of the Alabama Affirmance Penalty are objectionable. First, the statute punishes a class of persons who have done nothing wrong, while sparing others who should be subjected to the penalty. Second, it creates unfair economic barriers to access to appellate courts. Finally, it awards "windfall" damages to plaintiffs regardless of whether they have suffered harm. These objectionable features impact the constitutionality of the statute in different ways, as will be demonstrated in the discussion that follows.[3]

II. The Alabama Affirmance Penalty Is Unconstitutional Under The Equal Protection And Due Process Clauses Of The Fourteenth Amendment.

This Court has recently recognized that the question of the constitutionality of the Alabama statute "raise[d] important issues which . . . must be resolved." *Aetna Life Insurance Co. v. LaVoie,* 54 U.S.L.W. 4381, 4386 (U.S. April 22, 1986). This brief will discuss the principles of Equal Protection and Due Process, with respect to the ways in which the Alabama Affirmance Penalty violates them, and thus violates the Constitution.

A. The Alabama Affirmance Penalty Violates the Equal Protection Clause of the Fourteenth Amendment

The cases of this Court suggest a three-step analysis of Equal Protection:

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[3] The Alabama Supreme Court has upheld the constitutionality of the statute, although the decision contained no analysis of the Equal Protection or Due Process issues. *Central of Georgia Railway Co. v. Steed,* 287 Ala. 64, 76-77, 248 So. 2d 110, 120-21 (1971)(on rehearing).

1. What is the character of the right disadvantaged?

2. What is the state interest that the statute seeks to promote?

3. Is the statutory classification rationally related to the governmental interest?

Each of these three facets will be discussed in relation to the Alabama Affirmance Penalty.

1. Character of the Right: Equal access to the appellate courts is a fundamental right

The nature of the right disadvantaged affects the standard of scrutiny applied both to the governmental interest which the statute seeks to promote and to the precision with which the classification created by the statute must rationally relate to the governmental interest.

We refer to the opinion of this Court in *Plyler v. Doe*, 457 U.S. 202 (1982), which sets out the various standards of review depending on the character of the right disadvantaged. If the right is "fundamental," then "it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 217. In those statutes which affect "enduring" concerns in the constitution, but do not rise to the level of fundamental rights, the classification must reflect "a reasoned judgment consistent with the ideal of equal protection [that] may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217-18, 218 n. 16. If neither a fundamental right nor an enduring concern is involved, then the inquiry is whether "the classification at issue bears some fair relationship to a legitimate public purpose." *Id.* at 216.[4]

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[4] This Court has consistently stated that even this least exacting level of inquiry is not a "toothless" one. *Logan v. Zimmerman Brush Co.*,

Fundamental rights need not be explicit in the Constitution. *Plyler v. Doe,* 457 U.S. at 217 n.15; *Harris v. McRae,* 448 U.S. 297, 322 n.25 (1980) (right to equal access to the franchise in state elections). They have been described as those, like marriage, of "basic importance in our society." *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971); *Zablocki v. Redhail,* 434 U.S. 374 (1978). Fundamental rights are part of our heritage and basic in our scheme of values. *Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964) (right to travel abroad). They are those rights included in the "fundamental theory of liberty." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925) (right to send children to private school).

We submit that the Alabama Affirmance Penalty invades the fundamental right of equal access to an established appellate court system. From the beginning, the rights protected by this highest level of scrutiny have included:

> access to the courts of the country for the protection of . . . persons and property . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same . . . condition.

Barbier v. Connolly, 113 U.S. 27, 31 (1885); *see also, Maxwell v. Dow,* 176 U.S. 581, 590 (1900); *Bell's Gap Railroad Co. v. Pennsylvania,* 134 U.S. 232, 238 (1890).

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455 U.S. 422, 439 (1982) (Blackmun, J., separate opinion); *Trimble v. Gordon,* 430 U.S. 762, 767 (1977); *Mathews v. Lucas,* 427 U.S. 495, 510 (1976). Statutes tested under this analysis must still "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker v. Wilson,* 450 U.S. 221, 235 (1981); *Logan v. Zimmerman Brush Co.,* 455 U.S. at 439. The distinction must relate properly "to the consequences that flow from it." *Labine v. Vincent,* 401 U.S. 532, 551 (1971) (Brennan, J., dissenting), *reh den* 402 U.S. 990. The statute must be "carefully tuned to alternative considerations." *Trimble v. Gordon,* 430 U.S. at 772; *Mathews v. Lucas,* 427 U.S. at 513.

This Court has treated the right of access to the judicial system as an aspect of the First Amendment right to petition the government for redress of grievances. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 513 (1972); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967).

Griffin v. Illinois, 351 U.S. 12 (1956) acknowledged the protected status of this right in the context of appellate review.[5] Holding that an appellate procedure which required a costly transcript violated Equal Protection by discriminating against the poor. Mr. Justice Black stated:

> Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18.

This Court has specifically recognized that the right involved here is fundamental. The dispute in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), dealt with the constitutionality of a provision requiring inmates to use a portion of their earnings in prison to repay the cost of transcripts furnished in their criminal trials. The Court noted that to impose this financial obligation on the inmates "inevitably burdens" appeals. The Court, through Mr. Justice Stewart, stated:

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[5] The principle of the right of access to an established appellate system has been frequently reiterated. *See e.g., Blackledge v. Perry*, 417 U.S. 21, 25 n. 4 (1974); *Mayer v. Chicago*, 404 U.S. 189, 193 (1971); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam); *Lane v. Brown*, 372 U.S. 477, 483 (1963); *Burns v. Ohio*, 360 U.S. 252, 257 (1959).

> This Court has never held that the States are required to establish avenues of appellate review, but *it is now fundamental* that, once established, these avenues must be kept free of unreasoned distinctions. (Emphasis added).

Id. at 310.

A statute affecting a fundamental right may be unconstitutional even though the exercise of that right has not been totally abrogated. This Court has found it sufficiently objectionable if the additional risk or cost imposed by the statute has a chilling effect on a party's exercise of the basic right. *Jones v. Helms,* 452 U.S. 412, 426-27 (1981) (White, J. concurring); *Dunn v. Blumstein,* 405 U.S. 330, 340 (1972); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

Here, the petitioner has been required to assume the risk of a penalty, or fine, in order to obtain judicial review of a judgment. Unquestionably, the high price charged to a defendant in the Alabama courts for undertaking an appeal "heavily burdens the statutory right" which is at the same time freely given to others. *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). It unfairly discriminates against defendants who provide statutory assurances while seeking appellate review.[6]

2. State Interest: The interests promoted by the Alabama Affirmance Penalty are insufficient to sustain the constitutionality of the statute

Having identified the nature of the right restricted, it is next necessary to ascertain the interest of the state that is being promoted. If the state's interest is insufficiently compelling, or insufficiently substantial, such interest may not justify restriction

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[6] Even if the right restricted by the Alabama Affirmance Penalty were not a fundamental right, the analytic framework applied in this brief would still be appropriate, since the statute involved here will be shown to be devoid of any rational relationship to a legitimate governmental interest.

of a right which may be more important under the Constitution. For instance, a Connecticut statute creating a one-year residency requirement for welfare eligibility restricted a fundamental constitutional right to travel across state lines. The Court, in an opinion by Mr. Justice Brennan, noted that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969).

One must ask whether either of the two stated purposes for the Alabama Affirmance Penalty — penalization of frivolous or delay appeals and provision of additional damages to plaintiff-appellees — reflects a governmental interest that justifies the resulting restriction upon the right of appeal of one class of litigants. We think not.

Frivolous Appeals. There is certainly a state interest in restricting frivolous appeals. The state is legitimately concerned with judicial efficiency as well as with preventing its citizens from being subjected to prolonged and useless litigation. But such an interest cannot be sustained at the expense of imposing unequal and unfair financial burdens on special groups of litigants. This Court ruled in 1897 that a statute imposing attorney's fees on defendant railroads which lost on appeal was unconstitutional:

> It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U.S. 150, 153 (1897).

In the same case this Court quoted a Mississippi holding:

> "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

Id. at 161 (quoting *Chicago, St. Louis & New Orleans Railroad Co. v. Moss,* 60 Miss. 641, 646-47 (1882)).

This theme was reiterated the following term in *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews,* 174 U.S. 96 (1899). The Court criticized statutes that would

> pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff when no other individual or corporation is subjected to the same rule.

Id. at 104.

This is exactly what the Alabama statute does; it singles out defendant-appellants and subjects them to extra burdens as part of the appellate process.

This Court has more recently found that a statute requiring tenants to post a double bond in order to appeal an eviction, while raising no comparable bonding requirements for landlords who appeal, violates the Equal Protection Clause. *Lindsey v. Normet,* 405 U.S. 56 (1972). The amount of the

bond in *Lindsey* was not tied to potential losses of the landlord, and other provisions protected the landlord from the tenants' waste of the property, so that the court could "discern nothing in the special purposes of the...statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination." *Id.* at 78.

Additional Damages. If, on the other hand, we assume that the Alabama Affirmance Penalty is intended to provide additional damages to plaintiffs who were awarded judgments in the court below, it is difficult to see any state interest, let alone a compelling one, that is being served by such purpose. This penalty is not tied to the merits of the particular dispute. The following statement from *Lindsey v. Normet* is equally applicable to the present case:

> While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord.

Id. at 77.

Presumably an affirmed judgment carries the imprimatur of both the trial and appellate courts to the effect that adequate compensatory and punitive damages have already been awarded. This extra ten percent lagniappe for the plaintiff simply adds to the award without a finding of additional damage to the plaintiff or fault of the defendant. In effect, the Alabama Affirmance Penalty amounts to an arbitrary and nondiscretionary additur. *See Dimick v. Schiedt,* 293 U.S. 474 (1935).

The Illinois statute which was struck down in *Lindsey v. Normet* was at least designed to deal with "unique factual and

legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants." *Lindsey v. Normet,* 405 at 72. The Alabama Affirmance Penalty is tied to no special factual or legal situation, but is involved blindly in disputes which run the gamut of civil litigation. Hence, the case for unconstitutionality is even stronger than in *Lindsey v. Normet,* because the penalty is not focused to serve any substantive purpose.

3. Statutory Classification: The Alabama Affirmance Penalty discriminates against defendants who appeal from monetary damage awards

Once the state interest has been identified, it is possible to evaluate the rationality of the relationship between it and the classification established by the statute.[7]

To some extent the strictness of application of this element of rationality depends on the character of the right being restricted. For instance, a fundamental right can be restricted only by a classification "precisely tailored" to serving the compelling governmental interest. *Plyler v. Doe,* 457 U.S. 202, 217 (1982). The intermediate scrutiny requires a finding "that the classification reflects a reasoned judgment consistent with the ideal of equal protection." *Id.* at 217-18. And in other forms of state action there must be an "assurance that the classification at issue bears some fair relationship to" the governmental purpose. *Id.* at 216.

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[7] The nature of the state's interest can materially affect the rationality of the classification. *See e.g. Jimenez v. Weinberger,* 417 U.S. 628 (1974), which distinguished a Federal Social Security exclusion of benefits to illegitimate children (which violated equal protection) from Maryland's statutory limit of $250 per family on Aid to Families with Dependent Children (which did not violate equal protection, *Dandridge v. Williams,* 397 U.S. 471 (1970)) because the Maryland limitation was intended to restrict the availability of finite resources, while the Social Security Act provision had a different purpose, which lacked any rational relationship to its effects.

Whatever standard is applied, the classification created by the Alabama statute falls woefully short of bearing any rational relationship to serving either of the stated purposes.

Frivolous Appeals. A statute that overinclusively burdens those members of the class pursuing non-frivolous appeals and underinclusively leaves unburdened those outside the class whose appeals are frivolous cannot be supported. *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966).

The Alabama Affirmance Penalty is overinclusive because it carries an irrebutable presumption that all defendants who appeal and lose have done so frivolously. The simple fact that one loses an appeal does not, in itself, justify a conclusion that the appeal was frivolous. *Hughes v. Rowe,* 449 U.S. 5, 14 (1980)(per curiam). Moreover, because the amount of the penalty increases proportionately to the amount of judgment, the statute presumes that the larger the judgment, the more frivolous the appeal. Common experience demonstrates that, if anything, the reverse is true. A high judgment has inflicted greater injury on a defendant, and the size alone will often warrant inquiry into whether the defendant has indeed had a fair trial. Thus, the Alabama Affirmance Penalty not only is overinclusive as to the parties penalized, but it also compounds the irrationality by raising the penalty without justification.

The Alabama Affirmance Penalty is underinclusive because it does not necessarily reach all appeals that might be found to be frivolous. Appellants who were plaintiffs or who are appealing from a declaratory judgment or non-monetary equitable relief are not subjected to the penalty. Is there any reason to believe that frivolous or delay appeals are the exclusive province of defendants in cases affected by this statute,[8] as opposed to plaintiffs or to defendants in other kinds of cases?

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[8] Also, its companion statutes. Ala. Code §§ 12-22-73, 12-22-74 (1975). *See* text at 11.

The Alabama Affirmative Penalty is similar to the statute at issue in *Jimenez v. Weinberger,* 417 U.S. 628 (1974), which was aimed at preventing spurious benefits claims of illegitimate children. Inasmuch as spurious claims could be found in applications for benefits for legitimate as well as illegitimate children, this Court held that:

> the two subclasses...stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws....

Id. at 637.

Since there is no correlation between the affected defendants' appeals and frivolous appeals, the Alabama Affirmance Penalty is not reasonably related to preventing delay or frivolous claims.[9]

The existence of Rule 38 of the Alabama Rules of Appellate Procedure[10], a rule which is indeed "precisely tailored" to compensate for the consequences of frivolous appeals, contributes to the irrationality of the Alabama Affirmance Penalty. Under that Rule, if the court finds the existence of frivoiousness, it must determine the amount of damages. When no damages under Rule 38 are assessed, as was the case here, there is a confirmation that the damages were needlessly added when the appeal was substantial. On the other hand, if and when damages are assessed under Rule 38, the Alabama Affirmance Penalty is surplusage.

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[9] *See also City of Cleburne v. Cleburne Living Center,* 53 U.S.L.W. 5022, 5026 (U.S. July 1, 1985); *United States v. Robel,* 389 U.S. 258, 266 (1967); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

[10] The Federal Rule of the same number, which would have been the governing rule in this case, is almost identical to the state rule.

Additional Damages. The purpose of providing additional damages for affected plaintiff-appellees fares no better under analysis. The statutes and rules provide protection against uncollectability (by means of the supersedeas bond)[11] and against loss of use of the money because of delayed payment (through interest on the judgment).[12] It is hard to conceive of any damages not otherwise compensated that have been accrued by a plaintiff whose judgment is affirmed.[13] The classification is thus overinclusive as a remedy because appellants normally receive a windfall payment for no identifiable injury.

On the other hand, if some damage to the appellant were identified, it is impossible to distinguish its effect on the plaintiff whose judgment is affirmed (who is rewarded with a penalty) from one whose judgment is affirmed but modified (who gets no penalty). It is likewise irrational to assume that litigants in other classes of cases stand on a different footing with respect to any supposed damages. Therefore, the Alabama Affirmance Penalty is also underinclusive in terms of identifying those who might be damaged by delay.

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[11] Rule 8, Ala. R. App. P. (A. 8-9)

[12] Ala. Code § 8-8-10 (1975); Rule 37, Ala. R. App. P. (A. 6-7) (A. 9)

[13] This is in sharp contrast to the situation in *National Union of Marine Cooks & Stewards v. Arnold,* 348 U.S. 37 (1954), where there had been no supersedeas, but the judgment had not been paid prior to appeal. There, the Court specifically found that "Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." *Id.* at 44.

B. Section 12-22-72 Of The Code Of Alabama, Imposing A Statutory Affirmance Penalty, Violates The Due Process Clause Of The Fourteenth Amendment

Most of the controlling constitutional principles that relate to the Alabama Affirmance Penalty have been fully developed under the rubric of the Equal Protection Clause; however, there are two features which we submit violate Due Process whether or not they are deemed to be discriminatory under the Equal Protection Clause:

1. The Alabama Affirmance Penalty erects excessive and punitive obstacles in the way of access to court procedures.

2. The windfall award to the plaintiff of an additional ten percent of the affirmed judgment, without any requirement of culpability on the part of the defendant or injury to the plaintiff, creates liability based on a conclusive presumption of legal responsibility and amounts to a taking of property without Due Process of law.

Each of these features will be discussed.

1. Obstacles to Access: It is a violation of Due Process to discourage resort to the judicial system by levying a penalty against its use

Three lines of authority lead to a conclusion that Due Process is violated by the erection of punitive obstacles to appeal: i) the state which establishes an appellate system must comply with the requirements of Due Process, ii) access to the courts is a fundamental principle of Due Process, and iii) a rule or regulation which has a chilling effect on the exercise of a constitutional right is unconstitutional. The confluence of these lines of authority produces the result that the Alabama Affirmance Penalty violates Due Process.

Appellate Due Process. *Griffin v. Illinois,* 351 U.S. 12 (1956), established that the requirements of Due Process and

Equal Protection demand indigent defendants be provided with transcripts to enable them to file an appeal. The opinion of the Court noted, *inter alia,* that when a system of appeals is adopted, the requirements of Due Process must be met. *Id.* at 18. The ruling in that case did not necessarily depend on Due Process principles, however, because the Equal Protection Clause was sufficient to support the holding.

The Due Process feature of *Griffin v. Illinois* was implicitly adopted in *Boddie v. Connecticut,* 401 U.S. 371 (1971), and thoroughly explored in *Evitts v. Lucey,* 53 U.S.L.W. 4101 (U.S. Jan. 21, 1985), *reh. den.* ____ U.S. ____, 105 S. Ct. 1784, wherein it was held that the dismissal of an appeal from a criminal conviction because of the failure of counsel to file a timely statement of appeal was a violation of Due Process. Because no discriminatory conduct was involved, Equal Protection was inapplicable in *Evitts.* The petitioner in that case argued that because a state is not required to establish a system of appeals as of right, it is immune from constitutional scrutiny when it chooses to have such a system. *Id.* at 4105. In response to that argument, Mr. Justice Brennan stated for the Court:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. . . . Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular, in accord with the Due Process Clause.

Id.

Access to Courts. It is also established that denial of access to courts constitutes a violation of Due Process. In *Boddie v. Connecticut,* 401 U.S. 371 (1971), the issue was whether sixty dollar court costs for filing for a divorce violated Due Process when such fee had the practical effect of denying welfare recipients access to the court. The Court reasoned that access to courts was an incident of a meaningful opportunity to be heard and concluded "that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce . . . ." *Id.* at 382. See also *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974), holding that legal assistance to inmates is constitutionally required in connection with petitions claiming violation of civil rights.

This concern for the unfettered use of the court system is not unique. Time and again this Court has stated that the imposition of a penalty for the exercise of a statutory or constitutional right was not to be tolerated. *United States v. Goodwin,* 457 U.S. 368, 372 (1982); *Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978); *Blackledge v. Perry,* 417 U.S. 21 (1974) (state cannot substitute more serious charges when appellant wins a new trial); *Griffin v. California,* 380 U.S. 609, 614 (1965) (prosecutor cannot comment on defendant's choice not to testify).

The same analysis was applied to poll tax cases, where the tax was found unconstitutional because it "exacted a price for the privilege of exercising the franchise." *Harman v. Forssenius,* 380 U.S. 528, 539 (1965). There, this Court held that "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Id.* at 540.

Chilling Effect. Having established both that the requirements of Due Process are controlling and that access to courts is a component of Due Process, the next inquiry is whether the Alabama Affirmance Penalty has the practical ef-

fect of constituting a burden on access which denies Due Process. Although the penalty is paid only after an appeal is lost, every appellant must consider the risk of payment in the equation leading to the decision to appeal. A good analogy in identifying the burden may be found in *Lindsey v. Normet,* 405 U.S. 56, 77 (1972), in which the Court determined that a double bond penalty "heavily burdens" the right of appeal.

Essentially, the Alabama Affirmance Penalty encumbers the use of appellate review by imposing a penalty, in the form of significant risk, on those who choose to exercise their right to seek review. This has been held to be "patently unconstitutional." *North Carolina v. Pearce,* 395 U.S. 711, 724 (1969). In the *Pearce* case, this Court held that "it would be a flagrant violation of the Fourteenth Amendment" to establish a policy whereby those who had their convictions set aside and were again found guilty on retrial were to be punished with harsher sentences. *Id.* at 723-24. Because the threat of a potential penalty would chill the exercise of the statutory right of appeal, such a policy would violate Due Process. *Id.*

In striking down a statute that put defendants at extra risk by demanding a jury trial, this Court explained that the chilling effect of such a statute was the real evil. It is not necessary for the threatened penalty actually to prevent a party from exercising his rights in the judicial forum; it is sufficient that the threat be enough to "encourage" one to forego that to which one is entitled. *United States v. Jackson,* 390 U.S. 570, 581-83 (1968).

2. Conclusive Presumptions: It is a violation of Due Process to determine liability on the basis of irrebuttable presumptions

Another aspect of Due Process needs to be considered where a plaintiff is being awarded ten percent additional damages without a finding of compensable injury to the plaintiff or culpable conduct on the part of the defendant.

The Alabama Affirmance Penalty creates an irrebuttable presumption of entitlement to damages. There is no way for a defendant-appellant to rebut this presumption and avoid the penalty.

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948).

The same principle is recognized in civil cases. Sweeping presumtions have been found by this Court to violate the concept of Due Process because they deny the affected party any opportunity to overcome the adverse determination. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974) (cannot presume that pregnancy impairs a teacher's fitness for work); *Department of Agriculture v. Murry,* 413 U.S. 508 (1973) (cannot presume that a family member's prior status as a dependant of a noneligible person makes the entire family able to afford food without food stamps); *Vlandis v. Kline,* 412 U.S. 441 (1973) (cannot presume that a prior nonresident is not now entitled to resident tuition status); *Stanley v. Illinois,* 405 U.S. 645 (1972) (cannot presume that unwed fathers are unfit parents).

Burlington Northern stands to be adjudged liable for $30,500 additional damages. The liability is arbitrary and unwarranted by any measure of substantive law. If a court is to impress additional liability, it must do so based on facts that support that determination. Here, however, no facts were presented and no mitigating factors were weighed. Because such irrebuttability strikes at the very heart of the Due Process concept—the right

of an opportunity to be heard—the Alabama Affirmance Penalty is, by its very terms, unconstitutional.[14]

III. The Alabama Affirmance Penalty Is A Rule Of Procedure And Not Applicable To Actions In Federal Court

The Court of Appeals for the Eleventh Circuit imposed the ten percent penalty on Burlington Northern, following the precedent in that circuit based on *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979). The *Proctor* decision, in the Fifth Circuit, became binding on the Eleventh Circuit by virtue of *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981), which declared that all Fifth Circuit cases decided before October 1, 1981, were to be treated as precedent in the newly created Eleventh Circuit. Although subsequent decisions have questioned the validity of the *Proctor* holding, the court has felt bound to honor the precedent. *King v. Ford Motor Co.,* 604 F.2d 317, 318 (5th Cir. 1979) (Hill, C. J., specially concurring).

Subsequent to the division of the old Fifth Circuit into the Fifth and Eleventh Circuits, the new Fifth Circuit reconsidered *Proctor* and a later case that applied a similar Mississippi

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[14] Although this Court permitted the application of a similar Kentucky statute in a case arising in Kentucky state court seventy years ago (*Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261 (1916)), that decision should not be dispositive in the case at bar. In the first place, the Court's decision simply stated that the penalty may be assessed. There was no indication, either in the decision or in the abstracts of counsels' briefs (as they appear in Lawyers' Edition of United States Supreme Court Reports), that the question of the constitutionality of the statute was ever raised. *Id.,* 60 L.Ed. at 990-94. If an issue is not raised by counsel, the Court generally will not, *sua sponte,* address it, and it will not be conclusively resolved by the Court's holding. *Arizona Governing Committee v. Norris,* 463 U.S. 1073, 1087 n.17 (1983); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.,* 461 U.S. 731, 737 n.4 (1983). It appears, rather, that the Kentucky statute was attacked only on the grounds that the provisions of the Federal Employer's Liability Act superseded it. Nowhere in the case is there any holding, or even dictum, that the statute comported with the Fourteenth Amendment requisites.

statute, *Walters v. Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984), and with the unanimous concurrence of "not only all members of the panels in those two cases but also [of] all judges in active service who were not members of those two panels," the Fifth Circuit overruled *Proctor* and *Inexco*. *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 311 (5th Cir. 1984). The *Affholder* court noted that, "In neither [earlier] case did counsel direct the court's attention to, nor did either panel consider, the possible application of the Federal Rules Enabling Act, or the effect of the Supreme Court's decision in *Hanna v. Plumer.*" *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d at 307.

The *Affholder* decision in the Fifth Circuit comported with the holding in the Sixth Circuit, refusing to assess in federal court a similar penalty required by a Kentucky statute. *Nordmeyer v. Sanzone*, 315 F.2d 780 (6th Cir. 1963). It was also consistent with the holding in the (old) Fifth Circuit that refused to employ the Alabama Affirmance Penalty in Alabama cases heard in federal court because of a federal question. *Charles R. Shepherd, Inc. v. United States*, 292 F.2d 146 (5th Cir. 1961). Thus, in contradistinction to the practice in the Fifth and Sixth Circuits, and the practice in all circuits in federal question cases, the Eleventh Circuit stands alone in allowing its federal courts sitting in diversity cases to assess a state-mandated Affirmance Penalty.

A. The Federal Rules of Appellate Procedure Are Controlling and Take Precedence over State Rules in Federal Court

We find primary guidance on the appropriate standard of analysis in *Hanna v. Plumer*, 380 U.S. 460 (1965). This Court said:

> When a situation is covered by one of the Federal Rules, ...the Court has been instructed to apply the Federal

> Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471.

The *Hanna* rule was confirmed and reiterated in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980):

> The Court explained that where the Federal Rule was clearly applicable...the test was whether the Rule was within the scope of the Rules Enabling Act...and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I.

Id. at 748.

Hanna v. Plumer involved the applicability of the Federal Rules of Civil Procedure, while appellate procedure is at issue here. Nevertheless, both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure are based on the same Enabling Act, 28 U.S.C. §2072 (1982), and both went through the same process before promulgation.[15] We see no reason why the *Hanna v. Plumer* analysis should be inapplicable here.

We submit that the "situation is covered" by the Federal Rules of Appellate Procedure and that the Federal Rules comply with the scope and constitutional mandate of the Rules Enabling Act.

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[15] The Rules Enabling Act, 28 U.S.C. § 2072 (1982), provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." The Notes of the Advisory Committee following Rule 1 explain that the Rules of Appellate Procedure were also drawn under the authority of three other statutes: 28 U.S.C. § 2075 (bankruptcy rules), 18 U.S.C. § 3771 (procedure to and including criminal verdict), and 18 U.S.C. § 3772 (procedure after criminal verdict). Only 28 U.S.C. § 2072 is relevant here, since it is the only one that relates to civil suits.

1. The Federal Rules of Appellate Procedure are applicable

Three rules authorize the court to assess additional amounts against a losing appellant if certain criteria are met. Under Rule 37, if applicable law permits, the court can assess interest on the amount of the judgment affirmed. Under Rule 38, if the court finds that the appeal was frivolous, extra damages and single or double costs can be imposed. Under Rule 39, costs of the appeal can be allocated. These are the only provisions in the Rules that sanction the imposition of additional sums outside of the judgment itself, as a result of an appeal in federal court. There is simply no authority under the Rules for a federal court to add a ten percent penalty as an automatic, mandatory procedure, whenever a defendant-appellant loses an appeal.

In addition, Rule 8 spells out all the requirements, conditions, and obligations involved in obtaining a stay of execution of a money judgment upon the posting of a supersedeas bond. There is no assertion in this rule that the appellant's liability may be increased by ten percent as a consequence of complying with the terms of the rule.

A perusal of the Appellate Rules, including the four mentioned above, yields the conclusion that they are designed to be a complete and contained system of rules. Moreover, the Advisory Committee expressly said so. The Notes of the Advisory Committee on Appellate Rules, following Rule 1, provide, "The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process . . . ."[16]

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[16] By contrast, we do not find any similar statement in the notes to the Federal Rules of Civil Procedure. We submit that this omission is no accident.

Thus, given the fact that we have specific Federal Rules of Appellate Procedure already spelling out how and under what circumstances the federal appellate court may add costs to the parties in an appeal, and the consequences of use of a supersedeas bond, the Alabama Affirmance Penalty sits directly in conflict with these Rules because it authorizes different costs on appeal and different terms for using a supersedeas bond. Ironically, in a case that is precedent for the Eleventh Circuit, the Court of Appeals held that the Alabama statute is "not . . . in accord with appellate procedure in the federal courts." *Charles R. Shepherd, Inc. v. United States,* 292 F.2d 146, 148 (5th Cir. 1961).

This Court, in *Walker,* stated that the "first question must . . . be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp.,* 446 U.S. 740, 749-50 (1980). In making this determination the Court cautioned against narrowly construing federal rules "in order to avoid a 'direct collision' with state law." *Id.* at 750 n. 9. What we have here is a "direct collision" between the Federal Rules, which specify under what circumstances additional sums may be assessed and the requirements and obligations of a supersedeas bond, and the Alabama statute, which specifies different criteria for assessing additional amounts and new supersedeas obligations. If the Federal Rules are constitutionaly and statutorily valid, they must control.

Throughout the procedural history of this case, the Federal Rules have been followed. The stay of execution of the judgment upon a supersedeas bond was obtained pursuant to Rule 8, Federal Rules of Appellate Procedure. For the court then to go beyond what was authorized in the Federal Rules and to impose a penalty procedure created by state statute, outside the scope of federal procedure, was error.

2. The Federal Rules of Appellate Procedure are within the scope of the Rules Enabling Act and are constitutional

The question of whether a given rule is within the scope of the Rules Enabling Act hinges on whether "a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer,* 380 U.S. 460, 464 (1965), (quoting *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1941)).

Here, of the four federal rules involved, Rule 37 discusses how the appellate court shall apply and enforce applicable state law, Rule 38 involves administering a remedy for disregard of the duty not to waste the court's and the appellee's time with frivolous appeals, Rule 39 procedurally divides up the costs of an appeal, and Rule 8 spells out the procedure for staying execution of an adjudged remedy. Clearly these four rules all meet the test enunciated in *Sibbach* so as to fall squarely within the ambit of the Enabling Act.

As to the constitutionality of the Rules of Appellate Procedure, in *Erie* itself, Mr. Justice Reed stated that "no one doubts" the power, under the Necessary and Proper Clause, of the federal government to prescribe procedure for federal courts. *Erie Railroad v. Tompkins,* 304 U.S. 64, 92 (1938) (Reed, J., separate opinion).

B. Even if the Federal Rules of Appellate Procedure Were not Controlling, The Alabama Affirmance Penalty Is a Procedural Provision

When there is no conflict between the Federal Rule and the state law, the policies behind *Erie v. Tompkins* control. *Hanna v. Plumer,* 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). We submit that *Erie* dictates that federal

courts would not be obligated to assess the Alabama Affirmance Penalty.

We refer initially to the *Erie* holding itself. There were basically two prongs of attack on *Swift v. Tyson,* 16 Pet. 1 (1842), in Mr. Justice Brandeis' opinion. The first prong dealt with the multifarious problems of fairness which were produced by administration of justice in a federal system applying state substantive law. Mr. Chief Justice Warren later capsulated these problems into the "twin aims of the *Erie* rule; discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer,* 380 U.S. 468. The second prong was the unconstitutionality of the federal common law described by Mr. Justice Brandeis as follows:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

Hence the portion of the law which is outside the scope of the power of the federal courts to declare is relegated to the state. "The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the states." *Guaranty Trust Co. v. York,* 326 U.S. 99, 112 (1945). Unfortunately, the search for a single talismanic line drawing standard has been elusive. As noted in *Hanna v. Plumer,* "choices between state and federal law are to be made not by application of any automatic 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." *Id.,* 380 at 467. As a result, a variety of factors have been considered, depending on the kaleidoscopic changes in factual and legal situations presented to the Court.

Outcome Determination. Early cases following *Erie* presented fact situations wherein clearly a different result would occur

depending on whether the state or federal rule was applied. Thus in *Guaranty Trust Co. v. York* (applicable statute of limitations), *Ragan v. Merchants Transfer & Warehouse Co.* (effect of filing complaint on tolling statute of limitations) and *Woods v. Interstate Realty Co.* (foreign corporation qualification statute), the decision about whether the state law applied resulted in a complete change of results. Outcome determination provided a comfortable approach in those cases, and the state rule was deemed to be substantive.

The Alabama Affirmance Penalty easily passes this hurdle. By definition, the penalty is imposed only after the plaintiff wins at the trial and appellate levels. Thus victory would be unaffected by the unavailability of the penalty.

Rules Bound to Substantive Rights. As the fact situations developed so that the effect on who would be the prevailing party became less and less clear, the outcome determination analysis also seemed to wane in importance. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the issue was whether the federal court had to use bonding requirements set forth in a New Jersey statute authorizing derivative suit actions filed under that statute in federal court. Although the opinion of the Court followed the format of *Guaranty Trust Co. v. York,* an additional factor crept into the reasoning behind the holding that the bonding requirement was substantive:

> Rules which lawyers call procedural do not always exhaust their effect by regulating procedure. But this statute is not merely a regulation of procedure. With it or without it the main action takes the same course. However, it creates a new liability where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability is not usual and it goes beyond payment of what we know as "costs." If all the Act did was to create this liability, it

> would clearly be substantive. *But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case.* (Emphasis added.)

Id. at 555-56.

The *Cohen* opinion seemed to recognize that because the bonding requirement was inextricably tied to the liability, it was enacted by the New Jersey legislative body for a substantive purpose. The same factor was noted again in *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525 (1958), when Mr. Justice Brennan found it to be significant that the requirement that a judge rather than a jury rule on certain aspects of an action for workmen's compensation benefits was "not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Id.* at 536. Thus, the simple outcome determination test was augmented by a direct inquiry into the intent of the state legislature as to whether the rule was designed to aid the purposes of substantive law.

In this regard the Alabama Affirmance Penalty is set apart totally from any substantive law. It is included among the rules of procedure in the Code of Alabama. The statute is located in Title 12, Chapter 22 in the Code, under the headings of "Courts — Appellate Proceedings". This chapter provides, among other things, for appeal from various types of judgments (§§ 12-22-2 to 12-22-24), for bonds for security on costs of appeal and other contingencies (§§ 12-22-23 to 12-22-27), for records on appeal (§ 12-22-60) and for procedures on reversal of judgment or decree (§§ 12-22-10 to 12-22-71). It would be anomalous if the penalty which the Alabama Legislature has designated as procedural should be deemed substantive by the federal courts.

To the contrary, the supersedeas bond to which the Eleventh Circuit attached the ten percent penalty was not issued under authority of Alabama law. The supersedeas bond executed by

Burlington Northern in this case was filed under the authority of Rule 8, Federal Rules of Appellate Procedure. The federal and state bond requirements are somewhat different. The allowance of a stay and the requirement of a bond are all discretionary matters under the Federal Rule. The appellant must file a motion and show the reasons for the relief requested. The Alabama procedure would have required a bond in the amount of one hundred twenty-five percent of the judgment, and there is no discretion to deny the stay, if satisfactory bond is presented.[17] Federal Rule 8(b) contains provision for appointment of the clerk as agent for service of process with respect to liability on the bond. The bond may be enforced in the district court without the necessity of an independent action.

It is therefore evident that the Alabama Affirmance Penalty is bound to the procedure of Alabama courts, rather than to any substantive law. Thus the rights and obligations under the supersedeas bond in this case have been thoroughly defined by federal, not state, law.

Federal Policy. *Byrd v. Blue Ridge Rural Electric Cooperative* deals with an additional factor when a state rule runs against "affirmative countervailing considerations." *Id.*, 356 U.S. at 537. The issue of the availability of a jury trial brought that case "under the influence — if not the command — of the Seventh Amendment" *Id.* Mr. Justice Brennan continued:

> The policy of uniform enforcement of state-created rights and obligations, see e.g., Guaranty Trust Co. v. York (US) supra, cannot in every case exact compliance with a state rule — not bound up with rights and obligations — which disrupts the federal system of allocating functions between

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[17] The bond set in this case by the District Court equaled $345,750, which is approximately one hundred thirteen percent of the judgment. (J.A. 23)

> judge and jury....Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

Id. at 537-38.

The strong federal policy in favor of jury trials was allowed to prevail over the state practice when the state rule's effect would be to disrupt or alter an essential character or function of the federal court. To the extent that policy considerations of the type discussed in *Byrd* come into play in our case, again they would seem to favor the protection of the internal consistency of the Federal Rules of Appellate Procedure. As discused in the previous section of the brief, the Federal Rules of Appellate Procedure were designed to be a comprehensive code of procedure in the appellate courts. If selective state rules relating to isolated incidents of appeal were allowed to be inserted into perceived gaps of the Rules of Appellate Procedure, the state procedural rules would of necessity alter the essential character of federal appellate practice.

Forum Shopping and Inequitable Administrative Laws. It is slightly misleading to suggest that these are factors separate and apart from the outcome determination test. Instead they constitute an outgrowth or refinement of the outcome determination analysis. If a rule is certain to determine the outcome so that a different result would obtain, then the informed litigant who was a choice will choose the forum which produces the favorable result, and forum shopping of the type which had evolved in response to the rule of *Swift v. Tyson* follows. Similarly, the same divergent result causes the equal protection problems that *Erie v. Tompkins* was designed to prevent. Nevertheless, application of outcome determination to its farthest reach would conceivably result in declaring virtually every

rule to be substantive. *Hanna v. Plumer,* 380 U.S. at 468; 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4508 at 117-18 (1982). For instance, if rules as to what costs may be taxed against unsuccessful parties are different in state and federal courts, then a different result accrues to the extent that the amount of recovery changes. Accordingly, there must be some means of identifying what rules are so material to the litigation that they must be declared to be substantive. In response to this need, the *Hanna* Court refined the outcome determination test as follows:

> The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.
>
> > "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law." *Erie R. Co. v. Tompkins, supra,* at 74-75.
>
> The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of *Swift v. Tyson.* 304 U.S., at 73-74. That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state and federal litigation. 326 U.S., at 109. *Not only are non-substantial, or trivial, variations not likely to raise the sort*

> *of equal protection problems which troubled the Court in* Erie; *they are also unlikely to influence the choice of a forum.* The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. (Emphasis added.)

Hanna v. Plumer, 380 U.S. at 467-68.

We submit that the adoption of the Alabama Affirmance Penalty by the Eleventh Circuit neither discourages forum shopping nor promotes equitable administration of laws.

The normal forum shopping concerns would include questions such as whether the case will be entertained (e.g. a statute of limitations), whether the plaintiff will prevail (e.g. the elements of a cause of action), or whether a party has the capacity to sue (e.g. a qualification statute). The Alabama Affirmance Penalty does not involve any of the issues to be tried. Most litigants are interested in winning their case at the time when they are selecting a forum. It is highly speculative to suggest that much consideration is given to an appeal at that time.

By the same token, we see no impact on the equitable administration of laws in the context of *Erie*. Mr. Justice Brandeis cataloged the problems created by *Swift v. Tyson* in terms of what amounted to totally different results based on the forum selected. *Erie Railroad Co. v. Tompkins,* 304 U.S. at 75-76. Cases were cited where contracts, tort liabilities, and property instruments were given different meanings in terms of their legal consequences. The difference between the incidents of a supersedeas bond issued in federal and in state court can hardly rise to the status of the "mischievous results" described in *Erie*.

Constitutional Power. Finally, we refer to the basis of *Erie* itself, that making substantive rules of common law is outside federal power. The constitutional authority for the Rules Enabling Act was described in *Hanna v. Plumer* as follows:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id., 380 U.S. at 472.

There should be no question that Congress and the federal courts have the constitutional power to develop rules relating to the incidents of judgments and their appeals, providing such rules comport with equal protection and due process.

Net Effect. The cumulative effect of all the factors discussed above leads to the same conclusion — that the Alabama Affirmance Penalty is a procedural rule designed for and limited to judgments in the state court. There is little basis for any conclusion that the substantive law involving primary conduct of persons subject to the jurisdiction of the State of Alabama includes the provisions of this statute.

CONCLUSION

The Federal Court of Appeals assessed Burlington Northern an additional $30,500, simply because it appealed from an adverse judgment, which was affirmed. This additional sum represented no determination of wrongfulness in pursuing an appeal, and it compensated no additional damages incurred on the part of the appellees by virtue of the appeal.

We urge that the Alabama Affirmance Penalty be declared unconstitutional, and the Order of the United States Court of Appeals for the Eleventh Circuit, granting appellee's motion for a ten percent penalty assessment based on that statute, should be vacated.

In the alternative, the Order should be vacated because the rules allocating the source of law in our federal system require that the state's procedural statute should not be injected into federal court proceedings.

Respectfully submitted,

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APPENDIX

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All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

* * * * *

Rules of Civil Procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. § 2072 (1982).

* * * * *

Stay or Injunction Pending Appeal

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. . . .

(b) *Stay May be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. . . .

Federal Rules of Appellate Procedure, Rule 8.

* * * * *

Interest on Judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Federal Rules of Appellate Procedure, Rule 37.

* * * * *

Damages for Delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Federal Rules of Appellate Procedure, Rule 38.

* * * * *

Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Federal Rules of Appellate Procedure, Rule 39.

* * * * *

An Act concerning Writs of Error, and for other purposes.—Passed December 18,1811

Be it enacted by the Legislative Council and House of Representatives of the Mississippi Territory, in general assembly convened, That on writs of error, if the judgment, sentence, or decree be affirmed in whole, the plaintiff in error shall pay to the defendant in error, ten per

cent. damages on the sum due, with lawful interest from the day of rendering the judgment so affirmed, besides the costs of the original suit and writ of error.

Title 39, Chapt. III, Sec. 1, Toulmin's Digest of the Laws of Alabama (1823).

* * * * *

An Act concerning Writs of Error-passed December, 1820

And be it further enacted, That whenever the judgment of a circuit court shall, on appeal or writ of error to the supreme court, be affirmed, ten per cent. damages shall be allowed, and not more: *Provided,* That no damages shall be allowed in any cause in the supreme court, unless the judgment of the court below shall have been suspended.

Title 36, Chapt. XXVI, Sec. 11, Toulmin's Digest of the Laws of Alabama (1823).

* * * * *

§ 19. In case the supreme court of errors and appeals shall affirm entirely any judgment or decree brought before them, the plaintiff in error, if he be the defendant below, shall pay to the defendant in error, ten per centum damages on the amount due with lawful interest from the time of rendering the original judgment or decree, besides the costs of the original suit and writ of error.

§ 20. Whenever the judgment of a circuit court shall, on appeal or writ of error to the supreme court, be affirmed, ten per cent. damages shall be allowed, and not more: *Provided,* That no damages shall be allowed in any cause in the supreme court, unless the judgment of the court below shall have been suspended.

Judicial Proceedings—Error and Appeals, Sections 19-20, Aikin's Digest of the Laws of Alabama (1833).

* * * * *

Affirmation of stayed judgment-generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

Section 12-22-72, Code of Alabama (1975).

* * * * *

Interest on money judgments and costs.

Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the cause of action, at the same rate of interest as stated in said contract; all other judgments shall bear interest at the rate of 12 percent per annum, the provisions of Section 8-8-1 to the contrary notwithstanding; provided, that fees allowed a trustee, executor, administrator or attorney and

taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry.

Section 8-8-10, Code of Alabama (1975).

* * * * *

On any motion day, if the counsel for the defendant in error, or appellee, state that it is his belief that the case is brought into this court merely for delay, the record shall be submitted to the court without argument on either side. If the court on examining the record, consider it to be a delay case, the judgment shall be affirmed; but if it appear to be doubtful or difficult, or if when so offered to be submitted, or at any time during the term, the counsel for the plaintiff in error, or appellant, state to the court, that it is his opinion that on more full examination the judgment will be reversed or corrected, it shall not be so affirmed; or if such judgment of affirmance has been entered, it shall be set aside, and the case shall stand over for argument it [sic] its regular order.

Alabama Rules of Practice in the Supreme Court, Rule XI (1830).

* * * * *

Delay Cases

In any case set for oral hearing, if counsel for the defendant in error or appellee shall be of the opinion that the appeal was brought in this court merely for delay, he may file with the clerk his statement in writing to that effect. Copy of such statement shall be served upon counsel for plaintiff in error or appellant, who may within ten days after service of such statement upon him file with the clerk his written statement denying such fact. If no such denial is filed, the clerk shall forthwith submit the record to the court without argument on either side. If the court, on examining the

record, considers it a delay case, the judgment shall be affirmed; but if it appears to be doubtful or difficult, the court shall so state, and the case will stand for argument in its regular turn. If such denial is filed by counsel for plaintiff in error or appellant, the clerk shall in the same manner submit the record to the court, and the court may, after examining the record, either affirm the judgment, or if the case is doubtful or difficult, order the same set for oral hearing at the call of the first division next occurring, or may order that the case stand for oral hearing in its regular order on the call of the division from whence the case comes.

Alabama Revised Rules of Practice in the Supreme Court, Rule 17 (1958).

* * * * *

Damages for Frivolous Appeal.

In civil cases, if the appellate court shall determine on motion or ex mero motu that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Alabama Rules of Appellate Procedure, Rule 38.

* * * * *

Stay or Injunction Pending Appeal.

(a) *Stay by Supersedeas Bond.* The appellant shall not be entitled to a stay of execution of the judgment pending appeal (except as provided in Title 7, § 799, Code, and ARCP Rule 62(e)) unless he executes bond with good and sufficient sureties, approved by the clerk of the trial court, payable to appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render, when the judgment is:

> (1) For the payment of money only, in an amount equal to 150% of the amount of the judgment if the judgment does not exceed $10,000.00; or 125% if the judgment exceeds $10,000.00; . . .

Alabama Rules of Appellate Procedure, Rule 8.

* * * * *

Interest on Judgments

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed or the appeal is dismissed, whatever interest is provided by law shall be payable from the date the judgment was entered in the trial court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, the certificate of judgment shall contain instructions with respect to allowance of interest.

Alabama Rules of Appellate Procedure, Rule 37.